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SCAP-17-0000816

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Appeal of  
KAHEAWA WIND POWER, LLC,  
Taxpayer-Appellant.

Case Nos. TX 14-1-0266 and consolidated case TX 16-1-0272, TX 14-1-0267 and consolidated case TX 16-1-0273, and 1 TX 16-1-0275, 1 TX 15-1-0238, 1 TX 16-1-0328  
(Other Civil Action)

Consolidated Case Nos. CAAP 17-0000816, CAAP 17-0000817, CAAP-17-0000818, CAAP-17-0000819, CAAP-17-0000820

**CAAP-17-0000816 - APPEAL FROM 1) ORDER GRANTING TAXPAYER-APPELLANT KAHEAWA WIND POWER LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED SEPTEMBER 1, 2016, FILED APRIL 25, 2017, 2) ORDER DENYING APPELLEE COUNTY OF MAUI'S MOTION FOR SUMMARY JUDGMENT AND FOR DISMISSAL OF TAXPAYER-APPELLANT KAHEAWA WIND POWER LLC'S TAX APPEALS FILED NOVEMBER 12, 2014 AND FEBRUARY 3, 2014, FILED FEBRUARY 3, 2017, FILED MAY 15, 2017, and 3) STIPULATION FOR ENTRY OF JUDGMENT; FINAL JUDGMENT FILED OCTOBER 4, 2017**

**CAAP-17-0000817 - APPEAL FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017**

**CAAP-17-0000818 - APPEAL FROM 1) ORDER GRANTING TAXPAYER- APPELLANT AUWAHI WIND ENERGY LLC'S AUGUST 31, 2016 MOTION FOR SUMMARY JUDGMENT FILED APRIL 26, 2017, 2) ORDER DENYING APPELLEE COUNTY OF MAUI'S FEBRUARY 3, 2017 MOTION FOR SUMMARY JUDGMENT ET SEQ., FILED MAY 14, 2017; AND STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017**

**CAAP-17-0000819 - APPEAL FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017**

**CAAP-17-0000820 - APPEAL FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017**

Tax Appeal Court, State of Hawai'i  
Judge: Honorable Gary W.B. Chang

**APPELLANT COUNTY OF MAUI'S RESPONSE TO TAX FOUNDATION OF HAWAII'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES**

**DECLARATION OF MARCY MARTIN**

**EXHIBIT 1**

**CERTIFICATE OF SERVICE**

Department of the Corporation Counsel      205

PATRICK K. WONG                                      5878

Corporation Counsel

BRIAN A. BILBERRY                                      7260

Deputy Corporation Counsel

County of Maui

200 S. High Street

Wailuku, Hawaii 96793

Telephone: (808) 270-7741

Facsimile: (808) 270-7152

Attorneys for Appellant

COUNTY OF MAUI

**REPLY TO TAX FOUNDATION  
OF HAWAI'I'S AMICUS CURIAE BRIEF  
IN SUPPORT OF APPELLEES**

Contrary to what is stated in the Amicus Curiae Brief of the Tax Foundation of Hawai'i in Support of Appellees, there is nothing at all in the legal decision Kaheawa Wind Power, LLC v. County of Maui, 135 Haw. 202, 347 P.3d 632 (Ct. App. 2014) which determined that the wind turbine generators at issue in this case, or any type of wind energy machinery and/or equipment were or are excluded personal property under the law in 1981. Likewise, there is nothing in the Kaheawa opinion, or any law in Hawai'i whatsoever, which purports to set forth the "Common Definition" of "real property" which the Amicus Brief confusingly attempts to put forth.

While from the 1800's to 1947, Hawai'i had separate personal property tax law and real property tax law, *in 1947 the state legislature repealed the personal property tax law in its entirety*. See, Act 111, Sessions Laws of Hawai'i 1947. Without personal property tax law, there have been and are no defined exclusions from real property assessment and taxation for any property affixed to real estate, whether misleadingly characterized as personal property, or otherwise. See, **Exhibit 1**, excerpted Procedure and Reference Manual for the Property Assessment Program ("Reference Manual"), State of Hawaii, 1966, at pp. 350.11-1 through 350.11-4, attached. The repeated argument put forth by the Tax Foundation of Hawai'i (and Appellees); i.e., that the state legislature reserved onto the state some power to tax personal property, and/or excluded any transfer of authority by constitutional amendment to the counties of Hawai'i to assess *any* property as an accession to realty, is a misdirection. The notion put forth in the Amicus Curiae Brief that "the 1981 Common Definition necessarily represents an upper bound on the Counties' taxing powers" is vague at best, if not completely nonsensical.

The error in the Amicus Curiae Brief argument is further demonstrated by the attached opinion of the Deputy Attorney General, incorporated by reference within the State of Hawai'i Department of Taxation's 1966 Reference Manual, which makes it crystal clear that:

'[T]he test of whether any item is personal property or real property . . . is the manner in which the article is attached to real estate, the character of the article and adaptation, and the intention of the parties owning such property as to its use,' which is a statement of the tests American courts generally apply in determining what a fixture is.

See, **Exhibit 1**, at p. 350.11-4. The test is factual, *not* by some vague legal exclusion.

Appellant County of Maui in its consolidated opening and reply brief has canvassed the common law from multiple jurisdictions in this regard. As also demonstrated in Appellant's briefs, the Ohio law mistakenly relied upon by Appellees and by the Amicus Curiae Brief is an outlier. The Ohio law is based on a constitutional and statutory distinction between personal property and real property, which as noted above, has not existed in Hawai'i since 1947.

The Amicus Curiae Brief's reliance on Cartwright, *infra.*, for the proposition that certain types of machinery and equipment are *per se* or as a matter of law excluded from assessment as real property, is equally misplaced. In Cartwright v. Wideman, 9 Haw. 685, 690-91 (1892), the Supreme Court of the Kingdom of Hawai'i articulated the adaptability element of the fixture test as follows:

Here it is decided that whether fixture or not, *depends on facts*, and not on the opinion of the person making the annexation, and that moveable machines, whose number and permanency are contingent upon the varying conditions of the business differ from engines and boilers and other articles secured by masonry and designed to be permanent and indispensable to the enjoyment of the freehold.

Furthermore, the Amicus Curiae Brief's foray into Section 38 of the IRS Code, now *repealed*, is equally confusing and a further misdirection. Even assuming the 64-year old federal statute pertaining to depreciation of tangible personal property for purposes of income or

investment tax credits could somehow be resurrected, Code of Federal Regulation § 1.48-1 [Definition of section 38 property] (c) Definition of tangible personal property[,] refutes the Amicus Curiae Brief’s position of any relevance or application of the federal statute to local county tax laws. Specifically, CFR § 1.48-1(c) provides that “[c]onversely, property may be personal property for purposes of the investment credit even though under local law the property is considered to be a fixture and therefore real property.” Therefore, the concern asserted in the Amicus Curiae Brief about “taxpayer confusion” created by a “discontinuity between income tax and property tax” is not at all credible.

Finally, the wind turbines in issue are not analogous to the “electrical distributions systems” reflected in the IRS decisions, as the Amicus Curiae Brief suggests should somehow be exempt from assessment. The wind turbines are power generating equipment which generate and feed power. They *do not* distribute it.

In light of the above, the Amicus Curiae Brief really does not add anything of substance or merit to this appeal, just more of the same confusion and misdirection which Appellees have already offered in their respective opposition briefs.

DATED: Wailuku, Maui, Hawaii, December 7, 2018.

PATRICK K. WONG  
Corporation Counsel  
Attorneys for Appellant/Tax-Appellee  
COUNTY OF MAUI

By /s/ Brian A. Bilberry  
BRIAN A. BILBERRY  
Deputy Corporation Counsel